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SUPREME COURT, U.S.

Nos. 72-1420, 72-1422 and 72-1504

JUN 13 1973

In the Supreme Court of the United States

OCTOBER TERM, 1972

PEPSICO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

PEPSI-COLA BOTTLING COMPANY OF CORVALLIS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

THE COCA-COLA COMPANY, COCA-COLA BOTTLING CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND THE FIFTH CIRCUITS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
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STATEMENT

In each of these three cases, the question is whether the courts properly refused to enjoin the Federal Trade Commission from conducting an administrative proceeding because of the agency's failure to include as respondents allegedly indispensable parties.

The two Commission complaints involved in these cases charged that a manufacturer of soft drinks had imposed illegal territorial restrictions upon its bottlers, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The complaint in one case (*PepsiCo*) named only the manufacturer as a respondent; the complaint in the other case (*Coca-Cola*) also named three licensees. Neither complaint named the bottlers. The Commission, however, permitted all bottlers who sought to intervene to do so. The claim is that the Commission also was required to include the several hundred bottlers of each manufacturer as parties, and that its failure to do that so infected the administrative proceedings as to require the courts to enjoin the agency.

1. The Commission's complaint againt PepsiCo, the manufacturer of Pepsi-Cola, was filed in July 1971 (Pet. No. 72-1420, App. 3a). The Commission permitted three bottlers of the drink and a trade association, whose membership included 512 of the 513 bottlers of Pepsi-Cola, to intervene (*id.*, 4a). PepsiCo moved to dismiss the Commission proceeding on the ground that the other bottlers were indispensable parties. The administrative law judge and the Commission denied the motion (*id.*, Apps. C and D).

PepsiCo then filed suit in the United States District Court for the Southern District of New York to enjoin further Commission proceedings unless all bottlers were

made parties (*id.*, 5a). Petitioner in No. 72-1422, Pepsi-Cola Bottling Company of Corvallis, which had not intervened in the administrative proceedings, intervened in the district court in support of PepsiCo (*id.*, 4a, 6a). The district court denied a preliminary injunction and dismissed the complaint, holding that (*id.*, 35a):

> the Commission's denial of the motion to dismiss for non-joinder is not in the nature of a final order and therefore, under the applicable statutes, it cannot be reviewed by the federal courts at this stage of the proceedings.

A divided Court of Appeals for the Second Circuit affirmed. In an opinion by Judge Friendly, the court noted that the Commission would entertain additional applications to intervene by other bottlers, and it ruled that "the four intervenors and other bottlers who may reasonably apply will receive from the FTC all those rights 'provided by law' that are essential to a fair hearing. 16 C.F.R. §3.14" (*id.*, 8a). Although assuming *arguendo* that judicial intervention might be proper if the agency were acting plainly beyond its jurisdiction, the court concluded that petitioners had not "brought themselves within the possibly over-generous principle with respect to reviewability that we have put forward" (*id.*, 13a).

PepsiCo contended that the bottlers were indispensable parties because a Commission order directing it to cancel the territorial restrictions on the franchisees' marketing areas might subject it to liability in a suit by a bottler whose theretofore exclusive territory had been invaded by another. The court rejected this contention (*id.*, 14a):

> The proposition that a court would hold one person liable for doing something within the United States which a federal administrative agency, acting

within its jurisdiction, has found to be necessary for the enforcement of a federal regulatory statute arouses some astonishment. This is particularly so in a context where the persons who would seek to enforce liability know of the proceeding and have had an opportunity to intervene before the agency "in order to safeguard their interests." *Consolidated Edison Co.* v. *NLRB, supra,* 305 U.S. at 234.

2. The *Coca-Cola* case, No. 72-1504, is similar. The Commission permitted intervention requested by seven bottlers, but refused to join all the bottlers as parties (Pet. No. 72-1504, App. 2a). The Coca-Cola Company and bottlers of Coca-Cola filed suit in the United States District Court for the Northern District of Georgia to enjoin the Commission proceedings unless all the bottlers were made parties. The district court dismissed the suit, and the Court of Appeals for the Fifth Circuit affirmed (*id.,* 3a). That court held that any defect in the Commission's proceeding resulting from failure to join necessary parties did not warrant an exception to "the tightly circumscribed exceptions to 'the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' *Myers* v. *Bethlehem Shipbuilding Corp.,* 30 U.S. 41, 50-51 (1938)" (*id.,* 3a).

ARGUMENT

Both courts of appeals below correctly refused to enjoin the Commission's administrative proceedings on the basis of the claim that the agency had failed to join necessary parties. If the claim has any merit, it can be fully litigated on judicial review of any order the Commission ultimately may issue. There is no occasion

to interrupt the administrative proceedings at their threshold to litigate this collateral issue.[1]

The theory upon which the manufacturers are attempting to halt the Commission proceedings is the possibility that they might be subjected to liability as a result of a Commission order that would cancel the existing territorial limitations in their franchise agreements and, contrary to those agreements, would permit bottlers to sell in each other's territory. As the Second Circuit held, however, this possibility is too remote to justify at this time judicial intervention in the administrative proceedings. "The agency may find in favor of the respondent; the case may be settled; the reviewing court * * * will be in a better position to assess the matter when all the cards have been played" (Pet. No. 72-1420, App. 9a-10a). See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *United States* v. *Los Angeles & S.L.R.R.*, 273 U.S. 299, 309-310. Moreover, as that court also pointed out, there is little practical likelihood that "a court would hold one person liable for doing something within the United States which a federal administrative agency, acting within its jurisdiction, had found to be necessary for the enforcement of a federal regulatory statute" (*id.*, 14a). See *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 365; *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30; *Paramount Famous Lasky Corp.* v. *National Theatre Corp.*, 49 F. 2d 64 (C.A. 4).

It is also contended that the bottlers' interests themselves may be prejudiced by a Commission order direct-

[1] In *The Seven-Up Company* v. *Federal Trade Commission*, No. 72-1680, decided May 31, 1973, the Court of Appeals for the Eighth Circuit recently similarly refused to enjoin a companion Commission proceeding involving another soft drink manufacturer.

ing the manufacturers to terminate the territorial restrictions. The Commission, however, permitted those bottlers who sought to intervene to do so, and it will entertain requests for intervention by others. Such intervention would fully protect the interests of any other bottlers who believe that their position is not now being adequately presented.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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